

## Great Barrington Zoning Board of Appeals

Minutes of Sept. 8, 2011, meeting.

Attending were Vice Chairman Carolyn Ivory, Kathy Kotleski, Madonna Meagher, Michael Wise and alternate Don Hagberg, Ms. Ivory, acting as chair in the absence of Ron Majdalany, asked Mr. Hagberg to sit in for Dr. Majdalany.

On a motion by Ms. Kotleski, seconded by Mr. Hagberg, the board unanimously approved the minutes of the July 19, 2011, meeting.

The secretary gave the notice for the public hearing on the appeal petition of **Gary O'Brien** of a building commissioner cease-and-desist order, noting it was twice advertised in the *Berkshire Record*, was properly posted and was mailed to abutters of record. The hearing opened at 7:36 p.m. Members had made a site visit at 5:30 p.m.

Attorney Paul Feldman said his client, the applicant, had purchased the 11 Roger Road property off Blue Hill Road in October 2010. It is in a residential zone and it is a lawful pre-existing, non-conforming use — a commercial business. He said there has been a business at the location since 1929 and the use became non-conforming under provisions of the zoning bylaw adopted in 1978. He said the town had issues with Roger Trucking, primarily a trash collection business, at that location in 1996, the result an agreement of judgment in which the property owner agreed not to establish a transfer station at the site.

Mr. Feldman provided the board with affidavits from:

- June Williamson, granddaughter of Hugh Taggart (who started a trucking business on the property ca 1929), daughter of Leamon Roger (who took over the business in and concentrated on trash collection), and described vehicles and equipment stored there.
- Robert Brownson described the number of employees (15 to 18), truck storage, equipment (20 to 30 Dumpster containers) in later years.
- Gary J. O'Brien, present owner, describing his property maintenance service, 20 employees, 12 trucks, snowplowing equipment.
- Edward Karpinski, saying he has been a neighbor since 1929 and his opinion that vehicle traffic and equipment storage at the property is similar now to what it was in the past.

Mr. Feldman suggested to the board that for there to have been a change of use, the new use needs to be different and substantially expanded. He suggested the building inspector did not have the information in the affidavits when he issued his cease-and-desist order. He cited case law, 1990 Derby refining Co. v. City of Chelsea, and discussed whether there was a difference in neighborhood impact. He said there are differences between lawn services and trash hauling, but the work is done off-premises. Equipment stored here is relatively the same. Mr. Feldman said the building inspector found a substantial increase in equipment stored at the property and 20 more employees, thus it was more intense. But the affidavits suggest otherwise, he said. Citing 1980 Building Inspector of Seekonk v. George Amarol, he said case law recognizes that businesses must be able to grow. The agreement for judgment from 1996 is not a proper basis for the ZBA's decision, Mr. Feldman said, suggesting the board must go back to earlier uses.

In answer to a question from Mr. Wise, Mr. Feldman said there had been no abandonment on the property. Abandonment generally is 2 years, he said. He said the property became nonconforming with provisions of the 1978 bylaw. He said fluctuations in the degree of use does not constitute abandonment. Ms. Ivory asked about there being two businesses on the property (O'Brien and Roger Trucking). Mr. Feldman said there were multiple businesses being run from the property in Leamon Roger's day. Change in ownership is not regulated by zoning, he said.

Building Commissioner Ed May said he stands by his cease-and-desist letter. In answer to a question from Ms. Ivory, he said the court order allows Roger Trucking there and makes no mention of the "extra egregious intensity." In answer to a question from Mr. Hagberg, he said it is a contractor's yard as is defined under the zoning bylaw, and should only be on a non-conforming property with a special permit from the ZBA. In answer to a question from Mr. Wise, he said if the use is characterized as horticultural or agricultural, it cannot also be landscaping. The former is allowed on parcels of five or more acres by right under Massachusetts law. In answer to a question from Ms. Meagher, Mr. May said he had made a dozen site visits. Ms. Kotleski asked how familiar Mr. May was with Leamon Roger's business. Mr. May said he had not seen the affidavits, and

was unaware Roger did snow plowing. He said the court agreement was to park vehicles and operate an office, not to conduct a contractor's yard.

Mr. Doneski, in response to a question from Ms. Ivory, said he agreed with Mr. Feldman on points of law. He said the board needs to determine facts as to the nonconforming use. He said the town was only presented with the description in the 1996 document. He said the wording of the July 12 appeal filing gives as grounds the suggestion the O'Brien is operating under terms of the 1996 agreement and is now a contractor's yard. He said it is up to the ZBA to weigh what evidence is available. He said the 1996 agreement largely prohibits operation of a transfer station on the site.

Mr. Feldman said three traditional tests to determine change of use are whether the use is of the same nature and purpose as previously; whether the use is different in quality or character or degree; and its impact on the neighborhood. He said this is a second cease-and-desist order as town officials after the first was issued attempted to mediate a resolution. When nothing came of that, the building commissioner issued a second order.

A letter from the Planning Board in support of the building commissioner's order was read into the record. The board concluded the O'Brien operation is a contractor's yard and is prohibited in R-1B and R-2 zones. Planning Board member Jack Musgrave amplified that the board sees what is going on is an extension of a previous use and needs a SP.

The Selectmen declined to provide a comment on the appeal. Town Manager Kevin O'Donnell suggested the ZBA needs to look at the intensity of use in light of the 1996 agreement. Mr. May and Mr. Musgrave said the use needs an SP, even though an SP should not be issued for residential zones. Mr. Feldman said the Planning Board's reasoning makes intuitive sense, but not legal sense. Because its use would require an SP does not mean it's not grandfathered. After further words, he presented a petition signed by 10 Blue Hill Road residents who supported Mr. O'Brien's business.

Several members of the public made statements:

- Roger Belanger, Fairview terrace, who said Roger Trucking was only a couple of trucks when he moved here, then got noisier with roll-off containers. He said the Conservation Commission investigation resulted in the court suit that yielded the agreement in 1996. He said he had never seen lawnmowers as part of Roger's garbage business.
- Judith Kale, Blue Hill Road, urged the board to reject the appeal, saying the Rogers also had farm animals. By the 1990s, she said it was a full-scale garbage hauling business. She said concerns that a transfer station was in operation there resulted in the 1996 agreement. She said there has been an increase in vehicle activity on the property, storage of a street sweeper and trailers as well as trucks.
- Jonathan Hankin, Planning Board, former Fairview Terrace resident, said the property was split by Form A, a building lot sold to Peter Drucker, the rest retained for the business use. He said Roger Road is a "way in existence," not a town road, and is only one lane wide.
- David Shanahan said Leamon Roger's vehicles needed frequent work at the Ford garage. He said the biggest changes came after Leamon Roger sold the business to Roger Brownson. He said years ago there typically were two or three trucks at the property and that number eventually increased.
- Fran Coleman said she feels her property values have been diminished. She said there is a stone yard there and a gravel pit and a noisy hot rod. She said she feels unsafe as an abutter because the C&D order has been ignored.
- Mr. Hankin said he does not know that there is a gravel pit there, but if there is, its operation would not be allowed in residential zones. Ms. Meagher said the ZBA on its site visit saw half a hillside cut away by excavation.
- Sue Fisch by letter opposed the appeal application. Mr. Feldman said there is no gravel pit, though some material has been removed from a hill, a hill already shaped by earlier earth removal. He said Mr. O'Brien investigated whether the material would be suitable for horticultural use.
- Attorney Edward G. McCormick, also counsel to Mr. O'Brien, said overtures were made to neighbors but no meeting has been held to discuss the business.
- Tom Carmody suggested the ZBA had little time to digest the submission of last-minute affidavits.
- Thomas Jensen, Blue Hill Road, expressed doubts about the affidavits.
- Robert Brownson said his affidavit is truthful and that his grandfather regularly plowed Brooks, First Congregational and Great Barrington Savings Bank parking lots years ago.

On a motion by Mr. Hagberg, seconded by Mr. Wise, the board at 9:40 p.m. voted to adjourn the hearing to Thursday, Oct. 13, at 7:30 p.m. at the Great Barrington Fire Station on State Road.

In other business, the Zoning Board of Appeals:

- Met with Mr. and Mrs. **Marvin Lieberman** and Mr. McCormick regarding the placement of trash containers at the Barrington Bagelry location and the monitoring of a parking space on the north side of the building. Mr. May said the containers are where they are supposed to be, per a special permit. Under new state law, however, they are too close to the building. Mr. McCormick said the business owners are diligent in keeping customers from parking in the space in question. He said it is being used by the business from time to time for pickups and deliveries. Mr. May said he has seen no further violations.
- Met with **John Katz**, who is interested in becoming an alternate member of the board.
- Learned from the secretary that the **Bell/Shapiro** court suit, in appeal of the ZBA's upholding of a building commissioner cease & desist order for their property on Route 71, has progressed. Town counsel has filed a response to the appeal, and made counter-claims.
- Learned from the secretary that the state Attorney General's office has found no violation of the open meeting law, as was alleged to that office by **Bell/Shapiro**.
- Said they would attend a **Selectmen's meeting** Sept. 12 at 6 p.m. at Town Hall to discuss procedures.
- Said they would meet provisions of the **State Ethics Commission** online training program.

The meeting adjourned at 10:07 p.m.

Respectfully submitted

Bernard A. Drew



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